

**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

STATE OF OKLAHOMA,)	
)	
Plaintiff,)	Case No. 4:05-cv-00329-GKF-SAJ
)	
v.)	
)	
TYSON FOODS, INC., et al.,)	
)	
Defendants.)	

**STATE OF OKLAHOMA’S RESPONSE IN OPPOSITION TO TYSON FOODS, INC.’S
MOTION FOR RULE 37(a)(4)(A) EXPENSES AND ATTORNEYS’ FEES**

Plaintiff, the State of Oklahoma, ex rel. W.A. Drew Edmondson, in his capacity as Attorney General of the State of Oklahoma and Oklahoma Secretary of the Environment C. Miles Tolbert, in his capacity as the Trustee for Natural Resources for the State of Oklahoma (“Oklahoma”), hereby submits this response in opposition to Tyson Foods, Inc.’s Motion for Rule 37(a)(4)(A) Expenses and Attorneys’ Fees [DKT #1340] (“Tyson’s Motion”). Tyson’s Motion should be denied in its entirety.

Introduction

Defendant Tyson Food, Inc. (“Tyson”) has filed its motion for attorneys’ fees and costs under Federal Rule of Civil Procedure 37(a)(4)(A) (“Rule 37(a)(4)(A)”). Tyson bases its Motion on the fact that its “Second Motion To Compel Plaintiffs [sic] To Respond To Requests for Production Served April 25, 2007” [DKT #1258] was granted by the Court. [DKT #1336.] Tyson’s pursuit of sanctions is unwarranted. In response to Tyson’s April 2007 documents requests, the State did in fact produce documents and supplemented its production after meeting and conferring with Tyson. Tyson brought its Motion to Compel not to compel the production of documents, but rather to force the State to go back and identify responsive documents that had

already been produced. As discussed below, the State's handling of Tyson's April 2007 document requests, which gave rise to Tyson's Second Motion to Compel, was substantially justified. Moreover, the fact that Tyson itself, as well as other Defendants, engaged in the same litigation practice of which Tyson complained renders the imposition of sanctions unjust. Under such circumstances, Rule 37(a)(4)(A) prohibits the imposition of fees and expenses as a sanction.

Argument

I. RULE 37(a)(4)(A) DOES NOT PERMIT THE IMPOSITION OF TYSON'S ATTORNEYS' FEES AND EXPENSES UNDER THE CIRCUMSTANCES.

A. Fed. R. Civ. P. 37(a)(4)(A)

Tyson relies solely on Rule 37(a)(4)(A) in support of its Motion. Rule 37(a)(4)(A) provides:

(A) If the motion [i.e., the underlying motion to compel] is granted or if the disclosure or requested discovery is provided after the motion was filed, the court shall, after affording an opportunity to be heard, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in making the motion, including attorney's fees, ***unless the court finds that the motion was filed without the movant's first making a good faith effort to obtain the disclosure or discovery without court action, or that the opposing party's nondisclosure, response, or objection was substantially justified, or that other circumstances make an award of expenses unjust.***

Fed. R. Civ. P. 37(a)(4)(A) (emphasis added).

Accordingly, by its express terms, Rule 37(a)(4)(A) prohibits the imposition of expenses and attorneys' fees based on the granting of a motion to compel where "the opposing party's nondisclosure, response, or objection was substantially justified, or [where] other circumstances make an award of expenses unjust." These serve as independent grounds to preclude the award of fees and expenses. They apply to the facts here.

B. Sanctions Are Not Warranted

Rule 37(a)(4)(A) does not permit the imposition of Tyson's attorneys' fees and costs under the circumstances.

1. The State's objections were substantially justified.

The State's objections relating to the discovery requests underlying Tyson's Second Motion to Compel were "substantially justified," as that term is used in Rule 37(a)(4)(A), a finding of which prevents the imposition of fees and expenses as a sanction. Fed. R. Civ. P. 37(a)(4)(A). A party's "nondisclosure, response, or objection was substantially justified" when there is a "genuine dispute," *see* Advisory Committee's Notes on 1970 Amendments to Fed. R. Civ. P. 37(a)(4), or "reasonable people could genuinely differ on whether a party was bound to comply with a discovery rule," 8A C. Wright, A. Miller, & R. Marcus, Federal Practice & Procedure § 2288; *SEC v. Musella*, No. 83-Civ-342, 1984 WL 832, *2 (S.D.N.Y. Sept. 5, 1984) (declining to award fees and expenses); *Smith v. Montgomery County*, 573 F. Supp. 604, 614 (D. Md. 1983). The State's objections easily satisfy the "substantially justified" test.

The principal issues in Tyson's Second Motion to Compel related to the State's responses to Tyson's Requests for Production dated April 25, 2007 ("Tyson's Requests for Production" or "Requests") and involved: (1) the State's assertion of the attorney-client privilege and work-product doctrine; (2) the State's assertion of undue burden; and (3) those responses in which the State stated that documents responsive to such requests had been previously produced at a particular state agency. These issues are addressed in turn.

a. Attorney-Client Privilege and Work-Product Doctrine

In its responses and objections to Tyson's Requests for Production, the State asserted the attorney-client privilege and work-product doctrine for the purpose of preserving the privilege

and protection. The State objected to the Requests on such bases only “to the extent [each Request] seeks information protected” on such grounds. [DKT #1258-2.] Tyson complained in its Second Motion to Compel that the State was improperly withholding documents based on “blanket assertions” of attorney-client privilege and work-product protection without identifying such withheld documents on a privilege log. As pointed out during the meet and confer process, as well in its Response to Tyson’s Second Motion to Compel and during oral argument on such motion, the State did no such thing. [See DKT #1287 at 10-11; *see also* 9/27/07 Hearing Transcript at 85:4-13.] Instead, the following is true.

First, the State was *not* withholding any documents based on the attorney-client privilege or work-product protection that were not already identified on a previous privilege log,¹ but were otherwise deemed responsive.² [See DKT #1287 at 10-11.] Accordingly, there was no document production to compel, and Tyson was made aware of that during the meet and confer process. [See DKT #1287 at 10; *see also* 9/27/07 Hearing Transcript at 85:4-10 (“[A]s we put in our [response] and we informed counsel of this in our meet and confer, *the State didn’t identify any new documents that were responsive to these requests.* Therefore, the privilege logs that we had previously produced for all of these agencies from whence these documents came from still stood and we never refused to produce a privilege log.” [emphasis added]).]

Second, the State asserted the attorney-client privilege and work-product protection objections in order to *preserve* -- and not risk any waiver of -- such objections, doing so guided by the principle that an objection is waived if not timely asserted, and by the ongoing duty to supplement discovery responses and/or the production of documents if responsive information is

¹ The State’s privilege logs have been prepared by agency or by production, and not by Defendant. [9/27/07 Hearing Transcript at 85:15-21 (T. Hammons).]

² In accordance with LCvR 26.4(b), the State only listed those documents that are required to be identified on a privilege log.

thereafter acquired, *see* Fed. R. Civ. P. 26(e).

b. Undue burden

While the State asserted an objection to the Requests for Production based on burdensomeness, as stated in its Response to Tyson's Second Motion to Compel, "the State has not withheld any document on the basis of this objection." [DKT #1287 at 11; *see also id.* at 12 ("the State, unlike the Defendants, has not withheld a single document based upon burden objections").] The purpose in asserting such objection was simply to preserve it, but the State has "never refused to search for documents on the basis of this objection." [See 9/27/07 Hearing Transcript at 87:22-23.]

c. Documents previously produced

In its Second Motion to Compel, Tyson further complained about the State's responses to several of the Requests for Production that documents responsive to such requests had been previously produced at a particular state agency (the production of which would have a corresponding document index). In a case where, at the time of its Response to Tyson's Second Motion to Compel, the State had served responses to 251 requests for admission, 383 requests for production, and 144 interrogatories, and where document requests often are duplicative of earlier requests from the same or another party, the State's responses were substantially justified. This is so because "reasonable people could genuinely differ" on whether the State had a duty to do more under Rule 34. As stated in the State's Response to Tyson's Second Motion to Compel, "the majority of [the Requests for Production] have been asked before and in those rare instances where a [Request for Production] asked for new information, the State has provided it." [DKT #1287 at 13.] In fact, only 4 of the 33 Requests for Production requested documents that had not

been previously produced to the Defendants for review and copying.³

Moreover, as stated during oral argument on Tyson's motion to compel, the State responded as it did to the Requests for Production based also in part on the following:

The problem that we have is that because we didn't identify any new documents, every time a defendant comes up with a new request for production the State essentially will have to reindex its entire production for each new request for production.

[9/27/07 Hearing Transcript at 86:20-24.] The State's production is, notably, over one million pages and was produced as it was kept in the ordinary course of business with an index designed to assist the Defendants in locating documents responsive to the outstanding requests. The burden posed by a requirement that, upon any Defendant serving new discovery at any time, the State must re-review all of the documents produced (as well as those withheld on privilege grounds and already appearing on a privilege log) and re-sort those documents, is obvious, and arguments advanced in support of such a claim of burden are not sanctionable. In fact, the Court has invited further motions to be filed concerning that burden. [See 9/27/07 Hearing Transcript at 100:1-5.]

In sum, these grounds, which formed the basis for the State's objections to Tyson's Requests for Production, are, at a minimum, "substantially justified." Such a finding precludes the imposition of fees and expenses under the express language of Rule 37(a)(4)(A).

2. An award of sanctions would be unjust.

Moreover, "other circumstances make an award of expenses unjust." Fed. R. Civ. P. 34(a)(4)(A). Simply stated, it would be unjust to impose attorneys' fees and expenses as a sanction on the State for the granting of Tyson's Second Motion to Compel when other

³ Unlike the Defendants, the State has made every effort to be reasonable in crafting document requests. For example, in its September 13, 2007 requests for production, the State started each request with: "To the extent you have not already produced them, please produce copies of" (*See, e.g.*, Responses of Cal-Maine Foods, Inc. to Plaintiff's September 13, 2007 Requests for Production (attached hereto as Exhibit G).)

Defendants -- *including Tyson* -- have, as a litigation protocol, engaged in the same conduct -- specifically, the manner in which the attorney-client privilege and work-product doctrine were asserted -- that formed the basis for Tyson's motion.

With regard to the State's assertion of the attorney-client privilege and work-product doctrine, Tyson has done the same thing in discovery. For example, attached hereto as Exhibit A is an excerpt from Tyson Foods, Inc.'s Responses to State of Oklahoma's July 10, 2006 Set of Requests for Production. In those responses, Tyson asserted the following as "General Objection No. 4":

Tyson objects to each and every discovery request to the extent that it seeks a response, document, information, or item which is protected from discovery and privileged by reason of: (a) the attorney-client communication privilege; (b) the "work product" doctrine; (c) the "trial preparation" doctrine; (d) the joint defense or "co-party" privilege; or (e) any other applicable discovery rule or privilege.

[Ex. A at 2 (emphasis added).] Tyson's responses went on to say in General Objection No. 11:

The foregoing objections apply to each and every response herein. By specifically incorporating individual General Objections in any response, Tyson does not waive the application of the remainder of the General Objections to such response.

[Ex. A at 3 (emphasis added).] In addition, for example, Tyson responded to Request for Production No. 1, stating in part that "Tyson objects to Request No. 1 to the extent it requests the production of documents which are protected from disclosure for the reasons set forth in General Objection No. 4." [Ex. A at 5.] It did not identify in its response (or separately) which documents it believed were responsive but privileged, the standard to which Tyson sought to hold the State in at the September 27, 2007 hearing. [See 9/27/07 Hearing Transcript at 74:22-24 ("Your Honor, I need to know which documents are responsive to my requests have been withheld under a claim of privilege." (R. George).)]

Thus, while it complained in its Second Motion to Compel that the State had made

blanket assertions of the attorney-client privilege and work-product doctrine, Tyson has done the very same thing in its own responses. Based on the foregoing, it would be wholly unjust to award fees and expenses to Tyson as a sanction on the State for engaging in the same litigation protocol exercised by Tyson itself.

Moreover, Tyson's co-Defendants (represented by the same counsel) have also done the very same thing. In fact, for example, Defendants Tyson Poultry, Inc., Tyson Chicken, Inc., and Cobb-Vantress, Inc. asserted the *identical* General Objection No. 4, General Objection No. 11, and Response to Request for Production No. 1, as quoted above. Relevant excerpts from their responses are attached hereto as Exhibits B, C, and D, respectively. Similarly, by way of example only, Defendant Peterson Farms, Inc. asserted general objections based on the attorney-client privilege and work-product doctrine to the State's September 13, 2007 Set of Interrogatories and Requests for Production – general objections that were incorporated by reference to “each and every response herein.” (See Responses of Defendant Peterson Farms, Inc. to State of Oklahoma's September 13, 2007 Set of Interrogatories and Requests for Production, General Objection Nos. 3 and 9 (excerpts attached hereto as Exhibit E); *see also* Cargill Turkey Production, LLC's Response to State of Oklahoma's March 2, 2007 Set of Interrogatories and Requests for Production to Cargill Turkey Production, LLC, General Objection B and p.2 (incorporating language) (excerpts attached hereto as Exhibit F).) The fact that the Defendants have asserted the attorney-client privilege and/or work-product doctrine in a like manner as the State further warrants against the imposition of fees and expenses under Rule 37(a)(4)(A).

In sum, the circumstances surrounding the granting of Tyson's Second Motion to Compel do not warrant the imposition of Tyson's attorneys' fees and costs under Rule 37(a)(4)(A).

II. CONCLUSION

For the foregoing reasons, Tyson's Motion [Dkt #1340] should be denied.

Respectfully Submitted,

W.A. Drew Edmondson OBA # 2628
Attorney General
Kelly H. Burch OBA #17067
J. Trevor Hammons OBA #20234
Tina Lynn Izadi OBA #17978
Daniel P. Lennington OBA #21577
Assistant Attorneys General
State of Oklahoma
313 N.E. 21st St.
Oklahoma City, OK 73105
(405) 521-3921

/s/ M. David Riggs

M. David Riggs OBA #7583
Joseph P. Lennart OBA #5371
Richard T. Garren OBA #3253
Douglas A. Wilson OBA #13128
Sharon K. Weaver OBA #19010
Robert A. Nance OBA #6581
D. Sharon Gentry OBA #15641
Riggs, Abney, Neal, Turpen,
Orbison & Lewis
502 West Sixth Street
Tulsa, OK 74119
(918) 587-3161

Louis Werner Bullock, OBA #1305
Bullock, Bullock & Blakemore
110 West Seventh Street Suite 110
Tulsa OK 74119
(918) 584.2001

James Randall Miller, OBA #6214
222 S. Kenosha
Tulsa, Ok 74120-2421
(918) 743-4460

David P. Page, OBA #6852
Bell Legal Group

P. O. Box 1769\
Tulsa, Ok 74101-1769
(918) 398-6800

Frederick C. Baker
(admitted *pro hac vice*)
Lee M. Heath
(admitted *pro hac vice*)
Elizabeth C. Ward
(admitted *pro hac vice*)
Elizabeth Claire Xidis
(admitted *pro hac vice*)
Motley Rice, LLC
28 Bridgeside Boulevard
Mount Pleasant, SC 29465
(843) 216-9280

William H. Narwold
(admitted *pro hac vice*)
Ingrid L. Moll
(admitted *pro hac vice*)
Motley Rice, LLC
20 Church Street, 17th Floor
Hartford, CT 06103
(860) 882-1676

Jonathan D. Orent
(admitted *pro hac vice*)
Michael G. Rousseau
(admitted *pro hac vice*)
Fidelma L. Fitzpatrick
(admitted *pro hac vice*)
Motley Rice, LLC
321 South Main Street
Providence, RI 02940
(401) 457-7700

Attorneys for the State of Oklahoma

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of November, 2007, I electronically transmitted the above and foregoing pleading to the Clerk of the Court using the ECF System for filing and a transmittal of a Notice of Electronic Filing to the following ECF registrants:

Frederick C Baker fbaker@motleyrice.com, mcarr@motleyrice.com;
fhmorgan@motleyrice.com

Michael R. Bond michael.bond@kutakrock.com, amy.smith@kutakrock.com

Vicki Bronson vbronson@cwlaw.com, lphillips@cwlaw.com

Paula M Buchwald pbuchwald@ryanwhaley.com

Louis Werner Bullock LBULLOCK@bullock-blakemore.com, NHODGE@bullock-
blakemore.com;

Gary S Chilton gchilton@hcdattorneys.com

Robin S Conrad rconrad@uschamber.com

W A Drew Edmondson fc_docket@oag.state.ok.us, drew_edmondson@oag.state.ok.us;
suzy_thrash@oag.state.ok.us.

Delmar R Ehrich dehrich@faegre.com, etriplett@faegre.com; ; qsperrazza@faegre.com

John R Elrod jelrod@cwlaw.com, vmorgan@cwlaw.com

Fidelma L. Fitzpatrick ffitzpatrick@motleyrice.com

Bruce Wayne Freeman bfreeman@cwlaw.com, lclark@cwlaw.com

D. Richard Funk rfunk@cwlaw.com

Richard T Garren rgarren@riggsabney.com, dellis@riggsabney.com

Dorothy Sharon Gentry sgentry@riggsabney.com, jzielinski@riggsabney.com

Robert W George robert.george@kutakrock.com, sue.arens@kutakrock.com;
amy.smith@kutakrock.com

James Martin Graves jgraves@bassettlawfirm.com

Tgrever@lathropgage.com

Jennifer Stockton Griffin jgriffin@lathropgage.com

John Trevor Hammons thammons@oag.state.ok.us, Trevor_Hammons@oag.state.ok.us; Jean!
_Burnett@oag.state.ok.us

Lee M Heath ! lheath@motleyrice.com

Theresa Noble Hill thillcourts@rhodesokla.com, mnave@rhodesokla.com

Philip D Hixon phixon@mcdaniel-lawfirm.com

Mark D Hopson mhopson@sidley.com, joraker@sidley.com

Kelly S Hunter Burch fc.docket@oag.state.ok.us, kelly_burch@oag.state.ok.us;
jean_burnett@oag.state.ok.us

Tina Lynn Izadi; tina_izadi@oag.state.ok.us

Stephen L Jantzen sjantzen@ryanwhaley.com, mantene@ryanwhaley.com;
loelke@ryanwhaley.com

Bruce Jones bjones@faegre.com, dybarra@faegre.com; jintermill@faegre.com;
cdolan@faegre.com

Jay Thomas Jorgensen jjorgensen@sidley.com

Raymond Thomas Lay rtl@kiralaw.com, dianna@kiralaw.com

Krisann C. Kleibacker Lee; kklee@faegre.com

Daniel P. Lennington; Daniel.lennington@oag.ok.gov

Nicole Marie Longwell Nlongwell@@mcdaniel-lawfirm.com

Archer Scott McDaniel smcdaniel@mcdaniel-lawfirm.com

Thomas James McGeady tjmcgeady@loganlowry.com

Craig A. Mirkes; cmirkes@mhla-law.com

James Randall Miller rmiller@mkblaw.net, smilata@mkblaw.net; clagrone@mkblaw.net

Charles Livingston Moulton Charles.Moulton@arkansasag.gov,
Kendra.Jones@arkansasag.gov

Indrid Moll; imoll@motleyrice.com

Robert Allen Nance rnance@riggsabney.com, jzielinski@riggsabney.com

William H Narwold bnarwold@motleyrice.com

Jonathan Orent ; jorent@motleyrice.com

George W Owens gwo@owenslawfirmpc.com, ka@owenslawfirmpc.com

David Phillip Page dpage@edbelllaw.com, smilata@edbelllaw.com

Robert Paul Redemann rredemann@pmrlaw.net, scouch@pmrlaw.net

Melvin David Riggs driggs@riggsabney.com, pmurta@riggsabney.com

Randall Eugene Rose rer@owenslawfirmpc.com, ka@owenslawfirmpc.com

Michael Rousseau ; mrousseau@motleyrice.com

Robert E Sanders rsanders@youngwilliams.com,

David Charles Senger dsenger@pmrlaw.net, scouch@pmrlaw.net; ntorres@pmrlaw.net

Leslie J. Southerland; lsoutherland@rhodesokla.com

Paul E Thompson , Jr pthompson@bassettlawfirm.com

Colin Hampton Tucker chtucker@rhodesokla.com, scottom@rhodesokla.com

John H Tucker jtuckercourts@rhodesokla.com, lwhite@rhodesokla.com

Todd P. Walker; twalker@faegre.com

Elizabeth C Ward lward@motleyrice.com

Sharon K Weaver sweaver@riggsabney.com, lpearson@riggsabney.com

Timothy K Webster twebster@sidley.com, jwedeking@sidley.com

Gary V Weeks !

Terry Wayen West terry@thewestlawfirm.com,

Edwin Stephen Williams steve.williams@youngwilliams.com

Douglas Allen Wilson Doug_Wilson@riggsabney.com, pmurta@riggsabney.com

P Joshua Wisley ; jwisley@cwlaw.com, jknight@cwlaw.com

Elizabeth Claire Xidis cxidis@motleyrice.com

Lawrence W Zeringue lzeringue@pmrlaw.net, scouch@pmrlaw.net

Also on this 13th day of November, 2007 I mailed a copy of the above and foregoing pleading to:

David Gregory Brown
Lathrop & Gage LC
314 E HIGH ST
JEFFERSON CITY, MO 65101

Thomas C Green
Sidley Austin Brown & Wood LLP
1501 K ST NW
WASHINGTON, DC 20005

Cary Silverman
Victor E Schwartz
Shook Hardy & Bacon LLP (Washington DC)
600 14TH ST NW STE 800
WASHINGTON, DC 20005-2004

C Miles Tolbert
Secretary of the Environment
State of Oklahoma
3800 NORTH CLASSEN
OKLAHOMA CITY, OK 73118

/s/ M. David Riggs